U.S. Department of Labor

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1-129779
1-130014
1-129778
1-118133

IN THE MATTER OF:

Rene G. Cyr
Claimant

Against

Bath Iron Works Corporation
Employer/Self-Insurer

And

Commercial Union Companies
Liberty Mutual Insurance Co.
Carriers

APPEARANCES:

James W. Case, Esq.
For the Claimant

Stephen Hessert, Esq.
For the Employer/Self-Insurer

Kevin M. Gillis, Esq.
For the Employer and Liberty Mutual Insurance

(No Appearance by Agreement)
For the Employer and Commercial Union Companies

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on November 30, 2000 in Portland, Maine, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for a Carrier's exhibit and EX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to these claims.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times and until September 7, 1991.

3. On various dates Claimant alleges that he suffered injuries in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injuries in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion.

6. The parties attended an informal conference on December 12, 1999.

7. The applicable average weekly wage is in dispute for certain injuries.

8. The Employer and its Carrier have paid certain benefits for certain periods of time. (RX 2-RX 4)

The transcript reflects the following stipulations at pages 6-12 with reference to Claimant's shipyard injuries:

MR. CASE: I think we can, Your Honor, and there are several injuries involved, and I will proceed injury by injury, if I may.

JUDGE DI NARDI: Certainly. That would be appropriate.

MR. CASE: The first injury before us today is an injury with a date of 5/3/1984, an injury sustained to his back and neck, and it's

against Liberty Mutual and BIW. We can stipulate that the Act applies. We can stipulate to the event of the injury. We can stipulate that it occurred in the course of his employment, that an employer-employee relationship existed at the time, that notice was timely given. A claim for benefits was filed on 12/20/1993. 1 cannot find any evidence of a notice of controversion being filed. The informal conference was held on 12/12/99. The average weekly wage at the time of the injury was $443.88. We are claiming on this, as we are on all of these dates of injury, permanent total disability from 9/7/91 to the present and continuing. on this particular injury, benefits have been paid for two periods of disability, I believe, from 5/4/84 to 6/3/84, and from 9/7/91 to 3/15/93, I believe at the rate of $295.92, right?

MR. GILLIS: I don't know. We do have payment records that will go into evidence.

MR. CASE: Some medical benefits have been paid. There's two medical bills we think that are still in dispute, and that's in those exhibits here. Mr. Gillis is going to look into that. I believe the unresolved issues are continuing causation, nature and extent of disability. Mr. Gillis has raised the statute of limitations, I believe?

MR. GILLIS: Yes.

MR. CASE: And responsible carrier?

MR. GILLIS: Right.

MR. CASE: As well as controverting entitlement to any further medical expenses, and collateral estoppel based on the decision of the State Workers' Compensation Board from 3/15/93.

MR. GILLIS: Correct.

MR. CASE: That's all I have on that date of injury.

MR. GILLIS: I think with each of these, Your Honor, there have been a number of benefits paid, and obviously, under state compensation act, and I think all the parties are claiming credits for those under the statute.

MR. CASE: There's no dispute on that.

JUDGE DI NARDI: Noted for the record.

MR. CASE: The next date of injury is October 16, 1985, which is an injury to his head, neck, and upper back. We can stipulate that the Longshore Act applied. We can stipulate to the event of the injury. We can stipulate that it arose in the course of employment, that there was an employer-employee relationship at the time, that notice was given on

10/16/85. A claim for benefits was filed on 2/26/94. The notice of controversy was filed on 3/23/94. The informal conference was held on 12/2/99. We do not have an average weekly wage for this date of injury, and as I indicated above, the claim is the same claim for all of these dates of injury, total from 9/6/91, to the present and continuing. The unresolved issues, I believe, are medical causation, nature and extent of disability, statute of limitations, responsible carrier, collateral estoppel, and entitlement to medical expenses.

The next date of injury is 8/4/86, which is an injury to his right knee. we can stipulate that the Longshore Act applied, that the injury occurred on 8/4/86 in the course and scope of employment. There was an employer-employee relationship at the time. Notice was given on 8/6/86. A claim for benefits was filed on 8/26/94 –

MR. GILLIS: I have 3/26/94.

MR. CASE: Or 2/26 was the claim, and the notice of controversion was filed on 3/23/94, I believe. The informal conference was held on 12/2/99. The average weekly wage is unknown on this date of injury. The unresolved issues are causation, nature and extent of disability, statute of limitations, responsible carrier, collateral estoppel, and entitlement to medical expenses.

The next date of injury is a 12/3/1990 against BIW, self-insured. It's an injury to his neck. I think we can stipulate that the Longshore Act applies, and I think there's not -- there's no stipulation on the event of the injury?

MR. HESSERT: That's correct.

MR. CASE: Okay. And there's no stipulation -- well, we do have a stipulation of notice of 12/3/90. The claim for benefits was filed on 2/26/94, notice of controversy filed on 3/22/94. The informal conference was held on 12/2/99. We have an average weekly wage of $504.40, and the issues in controversy on this date of injury are the fact of the injury, Section 907; nature and extent of disability; permanency; and the availability of suitable work as well as –

MR. HESSERT: Statute of limitations.

MR. CASE: -- statute of limitations. The next date of injury is a 2/14/91 date of injury, an injury to Mr. Cyr's knees against BIW self-insured. We can stipulate that the Longshore Act applies. we can stipulate that the injury occurred. We can stipulate it was in the course and scope of employment. There was an employer-employee relationship at the time. Notice was given on 2/14/91, and the claim was filed on 2/26/94. It was controverted on 3/22/94, and the informal conference was held on 2/12/99. The average weekly wage was $510.63. Again, we are claiming permanent total from 9/6/91 to the present and continuing. He has been receiving benefits they have been paid on this

injury from 9/7/91 to the present, I believe at the rate of $170.30 a week. The extent of impairment is an issue.

MR. HESSERT: Let me just say something for a minute in terms of the issues and the stipulations.

MR. CASE: Yeah.

MR. HESSERT: We do stipulate that the injury occurred, but we do not agree there was injury to both knees. We -- it's our position that it was an injury to the left knee. Payment was made pursuant to the state decree, and the state decree is in evidence, and we believe that that is binding as to the nature of the injury itself, and that finding was that it was a left knee injury. The payments that are being made are being made in accordance with that state decree, so the additional issue, I guess, would be **res judicata** as to the effect of that decision.

On the notice stipulation, I stipulated that notice was timely given, and I think notice of controversion was timely also. I don't know the exact date the notice was given, but that's not an issue in this case.

MR. CASE: Those aren't issues.

MR. HESSERT: Yeah. So on that date of injury, the issue really is the extent of disability and the nature of the injury itself, and **res judicata**.

JUDGE DI NARDI: You may continue, Mr. Case.

MR. CASE: The last date of injury is September 7, 1991 -- I'm sorry, this is not the last injury.

MR. HESSERT: No.

MR. CASE: It's September 7, 1991, and I think the only thing we can stipulate to -- well, we can stipulate that the Longshore Act applies.

MR. HESSERT: We can stipulate that the Longshore Act applies and that there's an employment relationship on that date. There's nothing else that's agreed to, and basically, I think when he went out of work –

MR. CASE: This is the date that Bath Iron Works determined that his limits were so great that they couldn't employ him any longer, and he went out of work. Everything else, I guess, is in dispute, although we can probably stipulate to the average weekly wage.

MR. HESSERT: I think -- as far as I know, it's the same wage that

existed in February of ‘91. I'm willing to agree with that.

MR. CASE: Okay. The last date of injury is 8/18/93, and it's a carpal tunnel injury. Basically, he was diagnosed with carpal tunnel syndrome, which we believe relates back to his employment. I think there is nothing that has been agreed to.

MR. HESSERT: Right.

JUDGE DI NARDI: The record will reflect those stipulations by and between counsel with reference to those seven injuries that are being submitted to me for resolution. Counsel can further elaborate upon the implications of those injuries during their respective opening statements.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 31A	Attorney Case’s status report	01/24/01
EX 59	Attorney Hessert’s letter filing a	01/25/01
EX 60	Notice Relating to the Taking of the Deposition of Daniel Cote	01/25/01
CX 31B	Attorney Case’s letter filing the	03/08/01
CX 31	January 17, 2001 Deposition Testimony Of Christopher Brigham, M.D.	03/08/01
CX 31C	Attorney Case’s letter confirming the briefing schedule	03/08/01
CX 32	November 24, 2000 report of David L. Phillips, II, M.D.	04/03/01
CX 33	Claimant’s brief	04/03/01
CX 34	Attorney Case’s fee petition	04/03/01
RX 5	March 30, 2001 letter from Attorney Gillis filing the	04/02/01
RX 6	Brief on behalf of Liberty Mutual Insurance Company	04/02/01
EX 60A	Attorney Hessert’s request, filed by facsimile transmission, for short extension of time to file the Employer’s brief (the request was granted	04/06/01

	telephonically as no objections were Interposed thereto)	
EX 61	Attorney Hessert's letter filing the	04/08/01
EX 62	February 5, 2001 Deposition Testimony Of Mr. Cote, as well as the	04/08/01
EX 63	February 5, 2001 Deposition Testimony Of Arthur Stevens	04/08/01
EX 64	Employer's brief	04/11/01

The record was closed on April 11, 2001, as no further documents were filed.

Summary of the Evidence

Rene G. Cyr ("Claimant" herein), fifty-one (51) years of age, with a high school education and an employment history of manual labor, began working on February 18, 1974 as a tank tester at the Bath, Maine shipyard of the Bath Iron Works Corporation ("Employer"), a maritime facility adjacent to the navigable waters of the Kennebec River where the Employer builds and repairs vessels. He performed his assigned tasks all over the ships and the shipyard and, other than several layoffs, remained at the shipyard until his last day of work on September 7, 1991 due, according to Claimant, to the cumulative effect of his multiple medical problems. (CX 32) As a tank tester Claimant, who had no neck, back or knee problems prior to going to work for the Employer, had duties of going into the tanks of the ships to inspect and test the integrity of the boundaries of the tanks for leaks and other defects. He often had to crawl through a small opening in the tank and he used, **inter alia**, "a bucket of water and soap to check for air bubbles." He daily used various pneumatic tools, sockets and wrenches to perform his assigned duties. Whenever there was no work for him as a tank tester, he would be assigned work as a shipfitter and he continued to use pneumatic tools such as hydraulic jacks, grinding machines, welding machines, etc., Claimant remarking that as a smaller frame person he worked in the tanks most of the time. He has experienced a number of injuries at the shipyard and these are documented in this closed record.

Claimant's back problems apparently began in October of 1978 (or August 19, 1978 [RX 1 at 4]) when he fell from a work staging while painting his home. (CX 8 at 107) He was treated by Dr. Monahan, his family doctor, and, as the lumbar pain persisted, Claimant reported these symptoms at the Employer's Yard Infirmary on October 9, 1978 and Dr. David W. Schall, the Employer's then Medical Director, prescribed bed rest for one week beginning ON December 20, 1978, the doctor treating that lost time as non-occupational. (EX 48 at 282-284) He

returned to work on light duty for a week or so and the last progress note relating to that problem is dated January 2, 1979. (**Id.** at 284)

On May 3, 1984 Claimant, while working as a shipfitter, injured his back when he "was struck from behind by a fork lift" moving a dumpster from one place to another at the shipyard. He reported the injury to his Employer, went out on disability the next day and the Employer paid certain benefits for that injury on the basis of an Average Weekly Wage of $412.92. (CX 24 at 303-312) He was out of work for about one month and he continued to experience back problems upon his return to work as a tank tester because any physical exertion, such as lifting, bending or crawling, aggravated his back pain, Claimant remarking that his back has never returned to the **status quo ante** he enjoyed on May 2, 1984 and that he, beginning on May 5, 1984, went for chiropractic treatment as needed by Dr. Thomas F. Morgan (CX 12), or by Dr. David R. Odiorne. (CX 13)

Claimant continued his regular work activities and on October 16, 1984 he "struck (his) hard hat on a cable tube causing pain in (his) neck, and upper back and severe headaches." (CX 25 at 314-321) However, he continued to work and lost no time because of that injury.

On August 4, 1986 Claimant injured his right knee in a shipyard accident but he continued to work and lost no time from work. On December 3, 1990 Claimant alleges that he injured his neck in a shipyard accident. The Employer as a self-insurer disputes the occurrence of a work-related injury but acknowledges notice of the alleged injury on that date, that the claim was filed on or about February 26, 1994, that the Form LS-207 was dated March 22, 1994 and that the Average Weekly Wage as of that date was $504.40.

On February 14, 1991 Claimant alleges that he injured both knees in the course of his maritime employment but the Employer stipulates that Claimant injured only his left knee and that his Average Weekly Wage for that injury is $510.63. He continued to work until September 7, 1991 and that injury was the subject of a claim for benefits under the State of Maine Workers' Compensation Statute and Paul A. Cote, Jr., Hearing Officer, by a seventeen page decision issued on March 15, 1993, concluded, **inter alia**, that Claimant had been injured in shipyard accidents on May 3, 1984, while Liberty Mutual Insurance was the Carrier on the risk, and a left knee injury on February 14, 1991, while the Employer was a self-insurer and that Claimant's lower back problems were not due to his 1984 compensable injury, apparently due to his continued work activities and intervening injuries at work. Hearing Officer Cote found the Employer in its self-insured capacity to be liable for benefits for his fifty (50%) percent partial incapacity as a result of his February 14, 1991 left knee injury and the Employer was ordered to repay Liberty Mutual for the benefits it paid Claimant from September 7, 1991 through March 15, 1993 and to continue to pay such benefits to Claimant on and after that latter date, based upon the Average Weekly Wage of $510.63. (RX 1)

The Employer and Carrier submit that that decision is binding upon the parties pursuant to the well-settled doctrines of **Res Judicata,** Collateral Estoppel and Election of Remedies, in light of the landmark decision of the U.S. Court of Appeals for the First Circuit in **Bath Iron Works Corp. v. Director, OWCP (Acord),** 125 F.3d 18, 21, 31 BRBS 109, 111 (CRT) (1st Cir. 1997). On the other hand, Claimant submits that this Court should rely on the more recent decision of the Benefits Review Board in **Plourde v. Bath Iron Works Corporation,** 34 BRBS 45 (2000). This issue will be thoroughly discussed below in the section dealing with the nature and extent of Claimant's disability. I would note at this point that Hearing Officer Cote has thoroughly considered the evidence before me in his extremely detailed decision and his findings of fact are incorporated herein by reference and will be reiterated herein as needed for purposes of clarity and to deal with the unresolved issues presented herein.

As noted above, Claimant seeks compensation benefits for his permanent total disability beginning on September 7, 1991 as he no longer can return to work at the shipyard and as the Employer has not shown the availability of suitable alternate employment within his physical limitations. In the alternate, Claimant seeks an award for permanent partial disability, due to his multiple medical problems, Claimant alleging his loss of wage-earning capacity is higher than that established by Hearing Officer Cote.

Dr. Donald D. Kalvoda was Claimant's treating orthopedic surgeon between December 11, 1990 and at least August 1, 1995 (CX 8) and the doctor, as of August 27, 1991, opined that Claimant could return to work as long as "he avoids kneeling, squatting or climbing ladders or stairs" because of his bilateral knee problems. He was also told not to lift more than fifteen (15) pounds. (CX 8 at 104, 123-125) AS of June 11, 1992 the lifting limit was increased to twenty-five pounds. (CX 8 at 107) The doctor saw Claimant on March 2, 1995 "for numbness and tingling (of) both hands (the) right greater than (the) left," the doctor taking a history report "that in 1993 he began to experience some increasing numbness and tingling when driving for long periods." (CX 8 at 110) While Dr. Kalvoda reports that Claimant's hand problems were treated in 1993 at the Cyr Chiropractic Center (CX 8 at 110), a review of those records from December 15, 1990 through August 10, 1995 reflects chiropractic treatment only for Claimant's cervical, lumbar and shoulder problems. (CX 5 at 45-90)

As of that March 2, 1995 visit Dr. Kalvoda opined that Claimant's hand symptoms were due to "carpal tunnel syndrome right greater than left." Dr. Kalvoda prescribed a carpal tunnel release and Claimant underwent "right endoscopic carpal tunnel release under axillary block" on March 22, 1995. (CX 8 at 110-111)

As noted above, Claimant stopped working in the Employer's production trades on September 7, 1991 and, in July of 1999, the

Employer recalled Claimant to work as a parking lot attendant two hours daily, five days each week, at either the Bath or Portland, Maine lots. He began that job at $14.25 per hour and, as of October 23, 2000, his pay was increased to $14.65. Claimant described his job as simply watching vehicles entering the lot and making sure that the vehicle has the proper sticker or decal to park in that lot. He records the license plate number of any vehicle not having the proper sticker or decal but he makes no attempt to apprehend or stop the offender and turns in the plate number(s) to the Employer's Director of Security, Daniel Cote. According to Claimant, that job "is not real work" and if he is not there, no one else takes his place. In fact, Claimant has been at the Portland lot since October of 2000 and no one has replaced him in Bath. Claimant has tried to return to work by retraining himself for work in the repair of small engines and motorcycles but, as found by Hearing Officer Cote, that is "a field that apparently has little or no work available within the employee's labor market area." (RX 1 at 14) Claimant has looked for work but no one will hire him because of his multiple medical problems. Claimant's earnings for his work as a parking lot attendant from July 25, 1999 through November 19, 2000, in evidence as CX 21, total $10,554.00. He currently receives $170.30 in weekly benefits pursuant to the March 13, 1993 award of Hearing Officer Cote. (RX 1)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir.

1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697

(2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that work accidents occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson**

Terminals, Inc., 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer and its Carrier dispute that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128

(1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

In **Shorette**, the United States Court of Appeals for the First Circuit, in whose jurisdiction this case arises, held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, BRBS , BRB No. 99-0810 (May 2, 2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his multiple orthopedic and psychological problems, resulted from working conditions at the Employer's shipyard. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or

unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

In the case at bar, this closed record conclusively establishes, and I so find and conclude, that Claimant has worked at the Employer’s shipyard from February 18, 1974 through July 6, 1991 as a production worker, that he has worked as a parking lot attendant from July 21, 1999 through at least the date of the November 30, 2000 hearing before me, that he has

injured multiple body parts in the course of his maritime employment at the shipyard, that these injuries occurred on May 3, 1984 (OWCP No. 1-75595), on August 4, 1986 (OWCP 1-129666), on August 18, 1983 (1-129779), on October 16, 1984 (1-130014), on December 3, 1990 (1-116830), on September 7, 1991 (1-129778) and on December 14, 1991 (bilateral carpal tunnel syndrome - 1-118133), that these accidents constitute work-related injuries, that the Employer had timely notice thereof by virtue of his report to his immediate supervisor or by reports to on-duty personnel at the Employer's Yard Infirmary and that these reports are reflected in the Employer's Industrial Health Department Records in evidence as CX 19, that the Employer and/or its Carrier have authorized certain medical care and benefits and have paid him certain compensation benefits, some voluntarily and some pursuant to the state decree (RX 1) and that Claimant filed for benefits once a dispute arose between the parties. In fact, the only issue is whether or not these claims are barred by the March 15, 1993 decision of Hearing Officer Cote. (RX 1)

Employer and Carrier also submit that these claims are barred because Claimant has not complied with the requirements of Sections 12 and 13 of the Act.

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

Although the Employer did not receive written notice of the Claimant's injury or occupational illness as required by Sections 12(a)

and (b), the claims are not barred because the Employer had knowledge of Claimant's work-related problems or has offered no persuasive evidence to establish it was prejudiced by the lack of written notice. **Sheek v. General Dynamics Corporation**, 18 BRBS 151 (1986) (**Decision and Order on Reconsideration**), **modifying** 18 BRBS 1 (1985); **Derocher v. Crescent Wharf & Warehouse**, 17 BRBS 249 (1985); **Dolowich v. West Side Iron Works**, 17 BRBS 197 (1985). **See also** Section 12(d)(3)(ii) of the Amended Act.

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (19889). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

Section 13(d) specifies that the one (1) year statute of limitations is tolled by the pendency of a state workers' compensation claim. **Ingalls Shipbuilding Division, Litton Systems, Inc. v. Hollinhead**, 571 F.2d 272 (5th Cir. 1978); **Smith v. Universal Fabricators**, 21 BRBS 83 (1988), **aff'd**, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989); **Calloway v. Zigler Shipyards, Inc.**, 16 BRBS 175 (1984); **Saylor v. Ingalls Shipbuilding**, 9 BRBS 561 (1978); **George v. Lykes Bros.**, 7 BRBS 877 (1978); **McCabe v. Ball Builders, Inc.**, 1 BRBS

290 (1975). The burden of establishing the elements of Section 13(d) is on the claimant. **George**, **supra**, at 880. I find and conclude that Claimant has sustained his burden on this issue. The filing of a claim under a state workers' compensation law constituted a suit for damages within the meaning of Section 13(d) and thus tolled the Section 13(a) one (1) year statute of limitations.

As noted above, Hearing Officer Cote found that on August 15, 1991 the Employer had filed "a **Petition For Review Of Incapacity** and a certificate of suspension (of benefits), stating that the employee had resumed work, on account of an injury sustained by the employee on February 14, 1991, that on December 16, 1991 Liberty Mutual filed a **Petition For Award Of Compensation** on account of the February 14, 1991 injury, that the state hearing took place on July 30, 1992, that on August 17, 1992 Liberty Mutual filed a **Petition For Review Of Incapacity** on account of the May 3, 1984 injury, and that on September 16, 1992 the employee filed a **Motion To Re-Open Evidence** on account of both injuries. As also noted above, Hearing Officer Cote thoroughly reviewed the evidence before him and issued his decision on March 15, 1993. (RX 1)

Thus, in view of those procedural findings, I find and conclude that the claims filed herein under the Longshore Act are timely because the statute of limitations in Section 13 is tolled during the pendency of that state proceeding. As that decision was issued on March 15, 1993 and as benefits are still being paid Claimant under the state act, the claims for benefits filed by the Claimant on or about December 20, 1993; (CX 24) February 26, 1994;(CX 25) February 26, 1994; (CX 26) February 26, 1994; (CX 27), February 26, 1994;(CX 28) February 26, 1994;(CX 19) February 26, 1994 (CX 30) are timely.

While there is **dicta** in **Acord** as to whether or not the Section 13 Statute of Limitations is tolled during the pendency of that state proceeding, I view that Court's **dicta** as notice to the attorneys on that issue but as it is **dicta,** I still find that issue to be open and I must follow pertinent Board precedents on such tolling.

The sole issue remaining is the nature and extent of Claimant's disability and this issue will be determined by the landmark decision of the First Circuit in **Acord, supra,** a matter over which I presided and with which I am most familiar.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor

injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Sections 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a tank tester or as a shipfitter. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment

in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976). **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did submit probative and persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore would find Claimant has a total disability until March 17, 2000, the date of the thorough and well-organized transferrable skills analysis and Labor Market Survey of Arthur M. Stevens, Jr., the Employer's vocational consultant. Mr. Stevens reiterated his opinions at his February 5, 2001 deposition. (EX 63)

However, based on the March 15, 1993 decision of Hearing Examiner Cote (RX 1), I am unable to award such benefits to the Claimant, pursuant to the Full Faith and Credit Clause of the U.S. Constitution, especially in this day and age on the emphasis of states' rights, as further discussed below.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport**

News Shipbuilding and Dry Dock Company, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

As noted above, Hearing Officer Cote had the benefit of virtually the same evidence in this closed record and, while some of the medical reports herein are dated after March 15, 1993, the fact remains that those later reports by the same doctors and medical providers are cumulative in that they merely update Claimant’s medical condition between March 15, 1993 and his hearing before me. For example, the November 24, 2000 report of Dr. David L. Phillips, II (CX 32), detailing Claimant’s multiple medical problems, could very well be dated in 1991 and 1993 and be similar to the reports of Dr. Kalvoda (CX 8) and Dr. Pavlak and Dr. Esponnette (CX 11), respectively. Likewise, the May 25, 2000 report of Dr. Christopher R. Brigham, M.D., FACOEM, FAADEP, CIME (EX 58), also detailing Claimant’s multiple medical problems, also could very well have been written before March 15, 1993. I also note that Hearing Officer Cote reviewed and gave little weight to the July 31, 1992 Psychological/Intellectual Evaluation of David

Houston, Ph.D., (CX 6) and, in fact, denied Claimant's motion to reopen the evidence.

Thus, for all intents and purposes there is no new evidence before me and, accordingly, I find and conclude that these claims before me are barred by the March 15, 1993 decision of Hearing Officer Cote (RX 1) wherein he concluded, **inter alia,** that apportionment of liability between Claimant's May 3, 1984 injury, for which Liberty Mutual was on the risk, and his February 14, 1991 injury, for which the Employer as a self-insurer was on the risk, **WAS NOT WARRANTED IN THE STATE PROCEEDING**, even though such apportionment is permitted in that forum but not under the Longshore Act, except for those claims falling within the concept of "successive injuries" Hearing Officer Cote also concluded that Claimant's lower lumbar problems were "unrelated to his May 3, 1984 compensable injury," that Claimant's disability is due to his February 14, 1991 left knee injury, that such injury had resulted in a fifty (50%) percent incapacity from and after September 7, 1991 and that the Employer as a self-insurer is responsible for those benefits. Those benefits are currently being paid to the Claimant.

As noted above, I was the presiding Judge in the case of **Alvin Acord, supra,** and I rejected the Employee's position that that claim was barred by **Res Judicata** and Collateral Estoppel, primarily because of the obvious differences in the respective burdens of proof, the strong Section 20(a) presumption in the employee's favor, a provision lacking in the state statute and the obvious differences in the awards permitted under the state act. I have already pointed out that apportionment is permitted under the state act and I now note that the award of Hearing Officer Cote (**i.e.**, a flat award of "a 50% incapacity," without a reduction to dollars and cents and without further explanation) is not permitted under the Longshore Act as an award under Sections 8(c)(1) or (3) would be for the appropriate number of weeks. However, the First Circuit reversed my decision in **Acord, supra,** and I must follow that Court's landmark decision.

I have read the decision of the First Circuit in **Acord** and I agree completely with that most significant decision because it effectuates the purposes, letter and spirit of the Full Faith and Credit Clause of the of the U.S. Constitution. These claims before me, in my judgment, are a very good example of the **raison d'etre** of the **Acord** decision and its rationale.

Claimant had a full hearing before the Maine Workers' Compensation Commission and this Employer and its Carrier joined before me were full participants. Claimant had his day in court in that forum and Hearing Officer Cote has issued the most detailed comprehensive decision from that forum. It is most obvious that Hearing Officer Cote thoroughly reviewed the same evidence as there now is before me. While certain claims are dated after the date of such decision, the fact remains that those claims are based on evidence, facts and events presented to Hearing Officer Cote in that proceeding.

There must be a finality to such litigation and **Acord** provides guidance to the Longshore bar that the employee may be barred under the Longshore Act once the Maine Workers' Compensation Commission issues a

final decision on the merits of the claim(s). Such double litigation is not permitted by the Full Faith and Credit Clause of the U.S. Constitution.

While this decision herein may seem to be unduly harsh and incongruous, I agree with the rationale of the First Circuit's decision in **Acord, supra,** especially as I also agree that this litigation must come to an end.

Accordingly, in view of the foregoing, I hereby give Full Faith and Credit to the March 15, 1993 decision of Hearing Officer Cote (RX 1) and I conclude that these claims are barred by that decision. While the Board has attempted to distinguish **Acord, supra,** in **Plourde, supra,**[1] I am bound to follow pertinent precedents of the U.S. Court of Appeals for the First Circuit, in whose jurisdiction these claims arise.

In view of the foregoing, all other issues are moot and need not be resolved at this time, pending further instructions from the Board or First Circuit.

ENTITLEMENT

Since Claimant has been fully compensated for his work-related injuries, he is not entitled to additional benefits in this proceeding and his claim for benefits is hereby **DENIED** as these claims are barred by the final decision of the Maine Workers' Compensation Commission.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp**., 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowden Co**., 14 BRBS 805 (1981). [Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director**, OWCP, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), aff'g 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993)].

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[1]I agree completely with counsel for Liberty Mutual and the Employer that **Acord** and **Plourde** are distinguishable and I adopt and incorporate herein their reasons therefor. In this regard, **see** RX 6 at 9-12 and EX 64 at 10-11.

As Claimant has not successfully prosecuted these claims, his attorney is not entitled to a fee award.

ORDER

It is therefore **ORDERED** that the claims for compensation benefits filed by Rene G. Cyr shall be, and the same are hereby **DENIED**.

A
DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts
DWD:dr